SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1971

71 - 541

EDDIE MELVIN WHITAKER and
FREDDIE WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

EDDIE MELVIN WHITAKER and
FREDDIE WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Eddie Melvin Whitaker and Freddie Williams, respectfully pray that a writ of certiorari issue to review the judgment and per curiam opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 15, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court, Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 15, 1971. A timely petition for rehearing en banc was denied on August 19, 1971, and this petition was filed within 60 days of that date, Mr. Justice Douglas having granted a 30-day extension of time on September 23, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. **Whether the growing practice in the Ninth Circuit of rendering brief per curiam opinions which do not deal with the legal contentions of appellants satisfies the requirements of adequate appellate review or is an abdication of appellate responsibility and a violation of due process of law.**

2. **Whether petitioners were denied their Sixth Amendment right to a speedy trial by a two-year delay between the filing of the original indictment and the date of trial, during which time two crucial defense witnesses were lost, the memories of all witnesses impaired, and relevant evidence destroyed by the government.**

STATUTES INVOLVED

21 U.S.C. § 174

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or

in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

26 U.S.C. § 4704. Packages

"**(a) General requirement**--It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

STATEMENT OF THE CASE

On February 20, 1968, a three-count indictment was filed in the United States District Court for the Western District of Washington, Northern Division (Seattle) charging petitioners Freddie Williams and Eddie Melvin Whitaker with violation of the federal narcotics laws (21 U.S.C. § 174 and 26 U.S.C. § 4704[a]). The conspiracy charges in count 1 and the following two substantive acts were alleged to have occurred between February 2 and February 9 of 1968. The case was transferred to the Central District of California for trial, and after numerous pretrial motions the indictment was dismissed on November 5, 1968 on motion of the government when it could not locate its key witness, ex-convict Julius Bishop. Defendants opposed this motion and declared themselves ready for trial on that date.

On February 12, 1969, petitioners were reindicted in a three-count indictment, virtually identical to the previous charge, and bench warrants were issued by the United States District Court in Seattle, Washington. Petitioners did not learn of this indictment until July of 1969, when they voluntarily surrendered. Venue was again transferred to the Central District of California (CT 7, 15) ["CT" herein refers to the Clerk's Transcript].

On November 12, 1969, petitioners moved to quash the indictment for unnecessary delay (CT 22). The motion was denied by the trial court (CT 33), and petitioners unsuccessfully made application to the Ninth Circuit Court of Appeals for a Writ of Mandamus which would have compelled the trial court to quash the indictment. The Ninth Circuit denied the Petition for Writ of Mandamus on January 29, 1970.

Trial was finally commenced on March 31, 1970 (CT 37). After a three day jury trial a verdict of guilty as to both petitioners was returned (CT 94) and sentencing on May 18, 1970 resulted in petitioner Whitaker receiving six years on each count, to run concurrently, and petitioner Williams receiving eight years on concurrent counts (CT 98).

Petitioners then prosecuted an appeal to the Ninth Circuit, and their convictions were affirmed by the Court of Appeals in a five-line per curiam opinion filed on July 15, 1971. A timely Petition for Rehearing En Banc was denied on August 19, 1971.

STATEMENT OF FACTS

The evidence produced at trial revealed that a government informant and ex-convict, Julius Bishop, was introduced by his brother, Clark Buster, to petitioner Williams during a poker game held at his brother's home in Venice, California (RT 16) ["RT" herein refers to the Reporter's Transcript]. On the following day, Bishop discussed with both petitioners the possibility of selling narcotics in Seattle, Washington (RT 18-19). Bishop's role was to introduce Whitaker to friends of his in Seattle who might be interested in purchasing narcotics from petitioners (RT 21). Bishop testified that arrangements were then proposed for Whitaker and Bishop to travel to Seattle and to open up a new market for any narcotics which petitioners had agreed to supply. Prior to leaving, Mr. Williams handed Mr. Whitaker some little balloons and told him to use these as samples in Seattle (RT 26). Mr. Bishop and Mr. Whitaker then went to Seattle.

Upon arrival in that city, Bishop telephoned Agent

Abby of the Federal Bureau of Narcotics, who came over to Bishop's home in South Seattle (RT 28, 29). Whitaker was reluctant to deal with Abby, but after receiving assurances from Bishop he showed Abby where a sample of the narcotics was concealed (RT 31-33). Abby also testified that he discussed with Whitaker the possibility of making further purchases (RT 127).

After Agent Abby left, Bishop took petitioner Whitaker to a phone booth and from there he said he called petitioner Williams in Los Angeles (RT 33-34).

Bishop also introduced Whitaker to a person named Major, who ordered "three pieces of cake." Whitaker returned to Bishop's house and called Williams (RT 35). During the first telephone conversation Whitaker had asked for two shirts, and after seeing Major he asked for three girls. Whitaker told Bishop that "girls" stood for cocaine and "shirts" stood for heroin (RT 37-38).

Whitaker told Bishop that the narcotics were going to be delivered by mail; Bishop relayed this information to Agent Abby (RT 41).

On cross-examination Bishop admitted that he had three prior felony convictions (RT 42) and had worked as an informant for the Bureau of Narcotics in Seattle and had been in Los Angeles only two months before he met petitioners (RT 43-44). Bishop thought that his first meeting with petitioners took place in August of 1968 rather than in the early part of that year.

Bishop testified that Whitaker made three calls to Los Angeles while he was in Seattle (RT 94), and that the telephone in his home was listed to one Hubert Huston (RT 199). A special agent for the telephone company

identified a particular telephone as being located at an Enco Service Station in Seattle and listed the calls made from that phone (RT 109-110). The subscriber for that number was Hubert Huston (RT 118).

Agent Abby testified that he had known the informant Bishop for a number of years (RT 124) and that he ordered two ounces of narcotics from Whitaker (RT 128). Abby had also received a sample of brown powder in a balloon on the first day he met with Whitaker at Bishop's home (RT 133).

After receiving a call from Bishop informing him that the narcotics were to be placed in the mail, Abby notified the postal inspection division in Seattle. On February 10, he went to the main post office (RT 135-136), where, in his presence, a package was opened that contained a quantity of suspected narcotics, which he seized (RT 147). The package contained two bags of heroin and three bags of cocaine (RT 149). That morning agents of the Federal Bureau of Narcotics attempted unsuccessfully to deliver the package to the addressee after the contents had been removed. Allegedly the package was mailed from Venice, California, and was addressed to "J. E. Bishop" at his home address in Seattle (Government Exhibit 5).

Petitioner Whitaker was then placed under arrest at Bishop's residence pursuant to a federal warrant (RT 186). Petitioner's automobile was seized and a search of it produced a brief case belonging to petitioner Whitaker in which federal agents discovered papers bearing the name, address and phone number of "Major" and one "Willie Young," another acquaintance of Bishop to whom Whitaker had sold heroin (Government Exhibit 9) (RT 191).

In addition to these papers and the telephone records from the Enco Station, the government introduced the business records of Bishop's telephone and the February 1968 billing of Peggy Audrey, the girl with whom petitioner Williams was living (RT 209).

In defense the petitioners offered the alibi testimony of numerous witnesses. Clifton Alexander testified that he was at the poker game at Clark Buster's home when Buster introduced Bishop as his brother (RT 225). Alexander did not see petitioner Williams leave the game or talk to Bishop regarding narcotics (RT 231).

Melvin Alexander was also present at the poker game, and he did not see Williams leave the game or talk to Bishop as Bishop had previously testified (RT 238-239).

Petitioner Williams, testifying in his own behalf, stated that since his arrest he had tried unsuccessfully to find Clark Buster (RT 267). He denied discussing the possibility of distributing narcotics in Seattle with Bishop, whom Buster had introduced as his brother (RT 269). He left the game with Whitaker and went to Altadena, where Buster had said the poker game would resume. When Buster did not arrive, Williams took Whitaker home; then he went to his grandmother's house (Williams' grandmother died in February of 1969). Williams spent the night of February 5th and most of the 6th at her home (RT 275). He acknowledged living with Peggy Audrey but denied that he received any phone calls from Seattle at her home (RT 277). Williams denied mailing a package to Seattle and claimed that he was in fact living with his grandmother rather than Peggy Audrey on the dates telephone calls were received from Seattle (RT 282-283). Peggy Audrey corroborated Williams' testimony

(RT 296-301).

Eddie Whitaker testified that he agreed to go to Seattle with Mr. Bishop to take care of some matters concerning an accident and to get license plates for his car (RT 312). He categorically denied any discussions or transactions in narcotics with Bishop or Abby (RT 315-324). He admitted calling Peggy Audrey from Seattle (RT 327) for the purpose of contacting his wife, who was a friend of Miss Audrey's (RT 296). Whitaker's wife called him from Miss Audrey's home on several occasions while he was in Seattle (RT 300).

Whitaker testified that he spoke to Peggy Audrey twice on the telephone from Seattle; one of these calls was made from a phone booth at the Enco Station (RT 344-348). He never received any balloons as samples from Williams (RT 353).

Louise Whitaker, wife of petitioner Whitaker, testified that she called her husband while he was in Seattle from Peggy Audrey's house (RT 367).

Marcus Todd, a process server, testified that he tried to subpoena Carl Buster eight or nine times but was unsuccessful (RT 387).

THE QUESTIONS ARE SUBSTANTIAL

1. The Ninth Circuit Court of Appeals' decision in the instant case consists of a one-paragraph per curiam opinion which deals casually with two of the points of error raised by petitioners before that court. The constitutional claims are, by and large, swept aside without a word. It is submitted that this kind of procedure on the part of the

Courts of Appeals is an abdication of responsibility, resulting in serious interference with the right to due process of law. This Honorable Court accepted certiorari in the case of *Benton v. Maryland,* 395 U.S. 784 (1969), in order to elucidate the role of the lower courts in analyzing with particularity the constitutional claims of the appellants before them. The instant case presents an even clearer case of the problems raised in *Benton*–but which the Court left unresolved–since, in this case, the Ninth Circuit made no mention of petitioners' constitutional claims. A continuation of the present and growing practice of issuing brief per curiam opinions by the Courts of Appeals will result in serious interference with the constitutional rights of all persons who find themselves similarly situated as these petitioners.

First, it is obvious that appeals courts have a duty to make clear the bases of their decisions on particular points of law in order to fulfill their role with respect to *res judicata* and *stare decisis.* (See, generally, Hart and Sacks, "*The Legal Process,*" Chap. VII, Tent. Ed. 1958.) The alternative is uncertainty and loss of clarity in the law. Especially with regard to criminal defendants, this result would be intolerable.

Second, it is clear that the Courts of Appeals are bound by decisions of this Honorable Court. Per curiam opinions offer no method of insuring that the Courts of Appeals are, in fact, applying the law as this Court has interpreted it.

Third, a related problem is posed with respect to the individual petitioner who wishes to petition for a writ of certiorari before this Court. Under Supreme Court Rule 19, this Court is guided in its decision to grant certiorari

by conflict between the decisions of the Courts of Appeals in the various circuits or by conflict between a Court of Appeals and this Court. A petitioner attempting to assert a claim under either of these provisions will be in the difficult position of attempting to infer meaning from silence. The problem is more serious since it is clear that in some cases this Court will not set aside a decision of a Court of Appeals unless there is an affirmative indication of the incorrectness of the court's reasoning. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185.

Fourth, petitioners face a similar problem in the event they should wish to avail themselves of their rights under 28 U.S.C. § 2255. See *Kaufman v. United States*, 394 U.S. 217 (1969):

> "Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it is unclear whether the 'say' was on the merits? What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)? All these problems are common to state and federal prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate

litigation has been afforded."

2. Petitioners were originally indicted on February 20, 1968. After numerous pretrial motions, the indictment was dismissed on November 5, 1968 on motion of the government when it could not locate its key witness, Julius Bishop. Defendants opposed the motion at that time and declared themselves ready for trial.

Petitioners were reindicted on February 12, 1969, but did not learn of the indictment until July, when they voluntarily surrendered. On November 12, 1969 they moved to quash the indictment for unnecessary delay. The motion was denied, and trial was finally commenced on March 31, 1970.

During this two-year period, petitioners' defense was severely prejudiced by the following occurrences: the government lost evidence relevant to the case (the name and address marked on the outside of the package allegedly mailed to Seattle was destroyed), and the memories of the witnesses, both prosecution and defense, faded. More importantly, Mr. Williams lost the testimony of two material witnesses.

In February 1969, Maggie Biasly, the grandmother of Mr. Williams, died. Petitioner Williams contends that she would have been able to testify that he spent the nights of February 6 to 9 at her home with his daughter. Her testimony would have been in direct conflict with that of Mr. Bishop, who testified that on one of those evenings Williams was at his lawyer's and then later delivered balloons to Whitaker, and further that on one of those evenings he received an order from Whitaker.

Further, Clark Buster was to have been called as a witness had the trial proceeded on schedule in November of

1968. His testimony concerning the events of the poker game on February 5, 1968 and phone calls subsequently received from Seattle would have been material to petitioners' defense. After the dismissal of charges, however, his whereabouts became unknown. Had the defense been able to present these witnesses at trial, the testimony of Bishop would have been made very suspect. Since they were unable to present these witnesses, petitioners' ability to rebut the government's case was greatly impaired.

The Sixth Amendment to the United States Constitution provides that " . . . in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . . " It is said that four factors are relevant in determining whether the constitutional right to a speedy trial has been denied: the length of delay; the reason for delay; prejudice to defendant; and waiver by defendant. See, *e.g., Buatte v. United States,* 350 F.2d 389 (9th Cir. 1965). The interrelation of these factors is not yet clearly established, and this area of the law is still developing. There is a conflict among the Circuits as to which of the above factors the defendant must show in order to be entitled to a dismissal of the indictment. Compare *United States v. Jackson,* 369 F.2d 936 (4th Cir. 1966), holding that a defendant must show both an improper motive for the delay and prejudice resulting from it, with *Fleming v. United States,* 378 F.2d 502 (1st Cir. 1967), where it is said that defendant must establish either prejudice or improper motivation. While motions to dismiss have often been denied on the ground that the delay has not been shown to have been prejudicial (*Fleming v. United States, supra; United States v. Gladding,* 265 F.Supp. 850 [D.C.N.Y. 1966]), there is

increasing uneasiness about the requirement that prejudice be shown, at least where the delay is of Sixth Amendment proportions.

> "It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay."
>
> *Hedgepeth v. United States*, 364 F.2d 684 (D.C. Cir. 1966).

See also *United States v. Lustman*, 258 F.2d 475 (2nd Cir. 1958), *cert. denied* 358 U.S. 880.

A very recent discussion of the parameter of the speedy trial laws is found in the case of *Dickey v. Florida*, 398 U.S. 30 (1970), Mr. Justice Brennan concurring. Justice Brennan, citing the philosophical disparities among the Circuits in their interpretation and application of the clause, concludes that "when the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution." *Dickey v. Florida*, *supra*, at 55.

It is noteworthy that the Ninth Circuit's per curiam opinion affirming the conviction implicitly finds that an appellant claiming denial of a speedy trial and demonstrating prejudice resulting therefrom must also show from the record that the trial court's decision not to quash the indictment was "clearly erroneous." Petitioners submit that since a prima facie case of prejudice was established by them which was a direct result of the delay and prior dismissal (loss of witnesses and loss of evidence), and since denial of a speedy trial is constitutional, the trial court and the appellate court must assert that the

delay did not prejudice the petitioners "beyond a reasonable doubt." See *Chapman v. California*, 386 U.S. 18 (1967). In this case the government conceded that petitioners had been prejudiced but contended that the prejudice was not substantial and that therefore the trial court had not abused its discretion in denying the motion to quash the indictment.

In *Dickey v. Florida, supra*, Mr. Justice Brennan noted that the difficulty in cases where prosecution is delayed lies in determining how long the government may delay before prejudice is assumed.

> "It is likely that generalized standards would have to be developed to indicate when during the course of a delay there arises a probability of substantial prejudice."
>
> *Dickey v. Florida, supra*, at 55, Justice Brennan concurring.

Mr. Justice Brennan acknowledges that "many–if not most–of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved." *Dickey v. Florida, supra*, at 56.

CONCLUSION

So long as Congress has afforded to criminal defendants the right to an appeal, it is submitted that such an appeal shall be meaningful. Justice is not served by speeding up the process to such an extent that the quantity is increased and the quality diminished to a point of extinction. It is respectfully submitted that this Court should review the policies and procedures which have been inaugurated within the past year or two concerning the type of review given to criminal defendants; and a determined effort should be made to make sure

that the administration of justice has some meaning beyond speed and efficiency.

The issues raised in Appellants' Opening Brief to the Ninth Circuit Court of Appeals should have been discussed and *reviewed*, and in particular the question of whether or not a delay was harmless to their defense beyond a reasonable doubt. Petitioners respectfully request that a writ of certiorari issue to test the validity of the instant conviction.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDDIE MELVIN WHITAKER and FREDDIE WILLIAMS, Appellants.

No. 26441.

[July 15, 1971]

Appeal from the United States District Court
For the Central District of California

Before: CHAMBERS, TRASK and CHOY, Circuit Judges.

PER CURIAM:

The judgments of conviction in this narcotics case are affirmed.

Appellants' best point is a claim of prejudice in the dismissal of the indictment and reindictment in loss of witnesses.

We are unable to find that the district court's finding of no prejudice from the delay was clearly erroneous.

The mandate will issue forthwith.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on OCTOBER 13 1971, I served the within PETITION FOR WRIT OF CERTIORARI (WHITAKER and WILLIAMS v. UNITED STATES) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012
(3 copies)

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543
(3 copies)

I declare under penalty of perjury that the foregoing is ture and correct.

Executed on OCTOBER 13th 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
(714) 536-7161

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No. 71-541

In the Supreme Court of the United States

OCTOBER TERM, 1971

EDDIE MELVIN WHITAKER AND
FREDDIE WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1971. A petition for rehearing was denied on August 19, 1971. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to October 17, 1971, and on October 15, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

449-896—71